United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1362

To be argued by
RICHARD F. LAWLER

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1362

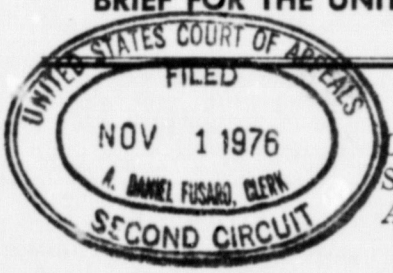
UNITED STATES OF AMERICA,
Appellee,

—v.—

CHEUNG KIN PING AND LAI MONG WAH,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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Preliminary Statement

This is an appeal by Cheung Kin Ping, a/k/a "Siao Moo Bee", and Lai Mong Wah, a/k/a "Wah Je", a/k/a "Gloria," a/k/a "Big Sister," from judgments of conviction entered on July 26, 1976, in the United States District Court for the Southern District of New York after a two-week trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 75 Cr. 614, filed June 2, 1975, charged the two appellants and three other defendants * in nineteen counts with various violations of the federal narcotics

* The other defendants were Larry Lombardi, Sammy Cho, and Chang Yu Ching.

laws. Count One charged all five defendants with a conspiracy to violate the federal narcotics laws from January 1, 1970 to April 30, 1972 in violation of Title 21, United States Code, Sections 173 and 174, prior to May 1, 1971, and Section 846 after May 1, 1971. Count Two charged Lai Mong Wah ("Lai") and Chang Yu Ching ("Chang") with the importation into the United States of approximately three pounds of heroin in January 1971. Count Three charged Lai with the sale of three pounds of heroin in August, 1970. Count Four charged Lai and Chang with the importation of approximately five pounds of heroin in September, 1971. Count Five charged Lai with distributing five pounds of heroin in September, 1971. Count Six charged Cheung Kin Ping ("Cheung") with distributing eight ounces of heroin in September, 1971. Count Seven charged Lai and Larry Lombardi with distributing one kilogram of heroin in September, 1971. Count Nineteen charged Cheung with the illegal use of the telephone on or about March 30, 1972, to further the conspiracy charged in Count One. The remaining counts charged only defendants other than the appellants.*

Trial commenced on June 7, 1976, and concluded on June 18, 1976, when the jury found the two defendants

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* Counts Two and Three charged offenses occuring prior to May 1, 1971 in violation of 21 U.S.C. §§ 173 and 174. Count Four charged an importation of heroin in violation of 21 U.S.C. §§ 951(a)(1) and 952. Counts Five through Eighteen charged distributions of heroin after May 1, 1971 in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A). Counts Five through Eight, Ten, Twelve, and Thirteen charged the defendants with distribution and possession with intent to distribute. Counts Nine, Eleven, and Fourteen through Eighteen charged Lombardi only with possession with intent to distribute.

guilty on all counts that were submitted to them for verdict except for Lai on Count Two.*

On July 26, 1976 Judge Brieant sentenced Cheung to a period of seven years imprisonment with a three-year special parole term on Counts One and Six, the terms to run concurrently. Imposition of sentence was suspended on Count Nineteen, and the defendant was placed on probation for a period of six months. Lai was sentenced on the same day to five years imprisonment on Count One, and concurrent ten-year terms on Counts Four, Five, and Seven with concurrent three-year special parole terms. The sentences on Counts Four, Five, and Seven were to run consecutively to the five-year sentence on Count One for a total of fifteen years imprisonment.

Cheung is at liberty pending the determination of this appeal. Lai is serving her sentence.

Statement of Facts

The Government's Case

1. Introduction: Nature of the conspiracy and role of its members

The evidence at trial established that from late 1970 until April, 1972, the appellants, their co-defendants and

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* In the middle of the jury's deliberations, Count Three was withdrawn from the jury's consideration, and a judgment of acquittal was entered. A typographical error in Count Three of the indictment had charged the distribution of three pounds of heroin as being in August, 1970. The same three pounds were charged in Count Two to have been imported in January, 1971. When the jury announced that they were still undecided on one count (Count Two), a partial verdict was taken finding Lai guilty on all other counts at which time the Court terminated the deliberations, without objection from either side, dismissed the jury, and entered a judgment of acquittal as to Count Two.

many others in New York City, Washington, and Hong Kong operated a heroin network that brought massive amounts of pure heroin to the United States where it was re-distributed to wholesalers who prepared it for further distribution. During this period Lai was a partner, along with Chang and Yuin Kwei Sang, a/k/a "George Yuin", ("Yuin") in arranging for the importation of pure heroin from Hong Kong. Chang went to Hong Kong in mid-1970 to set up the deliveries while Yuin and Lai remained in New York where they received a three pound shipment in late 1970 and an eight-pound shipment in July, 1971.

Yuin and Lai sold most of their heroin from these two shipments to Liu Yueh Han, a/k/a "Dr. John Liu" ("Dr. Liu"), a restaurant owner in Washington, D.C. who, on one occasion, used his assistant Cheung to pick up narcotics, and to Larry Lombardi, a New York heroin wholesaler, who lived in New York near Chinatown. In September or October of 1971, the Yuin-Lai partnership began to purchase heroin from a new supplier, Sammy Cho. Cho originally offered Yuin five pounds of heroin and then sold him ten pounds. This heroin was sold to Lombardi for $90,000. In October, 1971 Cho sold Yuin twenty more pounds, which Yuin in turn sold to Lombardi. Sometime during early December, 1971 Yuin ran out of the heroin which had been supplied by Cho. The profits from these transactions were split among Lai, Chang, and Yuin.

In early 1972, Yuin and Lai were in Hong Kong at the same time with Cheung, Cho, and two of her old friends, Loh Ah Dee ("Loh") and Ka Chang Fu, a/k/a "Ah Sung" ("Ka"). These six people agreed to export pure heroin from Hong Kong to the United States. Cheung, Loh, and Ka arranged for the purchase of the heroin in Hong Kong. Cheung and Cho were to take delivery of the heroin in the United States, and Lai and Yuin had responsibility to see that it was sold after it arrived.

Cheung and Ka hired Ting Yee Fong, a/k/a "Doo Moo Bee", ("Ting") a merchant seaman, to bring the heroin to the United States on board the vessel. Ting left Hong Kong in mid-February, 1972 and brought the heroin, 22 pounds in toto, to Miami, Florida where Cho and Cheung met him when his ship landed.

All three then were arrested in possession of the heroin by Customs agents, thus bringing the conspiracy to a close.

2. The Chang, Yuin, and Lai Partnership

A. The First Shipment

In early 1970, Yuin met Lai, then a waitress at the Golden Star Bar, in a mah jongg club in Chinatown. (Tr. 22-23; GX 20).

At about the same time he met Chang, and shortly thereafter, in March or April, 1970, the three of them —Lai, Chang, and Yuin—began discussing narcotics.* (Tr. 26-27).** On one occasion Yuin heard from Loh,*** another habitue of the mah jongg parlor, that

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* Yuin pleaded guilty on May 5, 1976 to one count of Indictment 72 Cr. 1148 charging distribution of heroin in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(A). On September 16, 1976 he was sentenced to time served and a three-year special parole term.

Yuin testified that he had first become involved in narcotics in 1969 when he traveled to Hong Kong and bought 30 ounces of heroin and had it imported into the United States in a camphor trunk. (Tr. 17-21).

** "Tr." refers to the trial transcript; "GX" refers to Government Exhibits; "Br." refers to the brief on appeal of the specified defendant; "A" refers to the separate appendix of the defendant.

*** Loh was named as an unindicted co-conspirator.

Chang had received a sample of heroin from Hong Kong. (Tr. 27) . Yuin discussed the sample with Lai and Chang, and after which Chang invited Yuin to put up $1500 and join him and Lai in importing herion from Hong Kong. (Tr. 28-29).

Chang left for Hong Kong shortly thereafter. (Tr. 30). Chang corresponded with Lai and Yuin after he left and told them by letter that heroin would be arriving on board a ship and that the sailor carrying the heroin would come to the Golden Star Bar to notify Lai or Yuin. (Tr. 33-34). Near the end of 1970, a sailor arrived at the Golden Star Bar and told Lai, who informed Yuin, that the heroin had arrived (Tr. 35-38; GX 22) Lai and Yuin then went to a wharf on Staten Island late that night where they picked up two cartons of foodstuffs and returned to Yuin's home on 80 First Avenue. (Tr. 39-43; GX 23, 24). There they removed plastic bags containing approximately twenty-two ounces of white heroin and between sixty to seventy ounces of brown heroin which they stored in Yuin's apartment. (Tr. 44). At approximately the same time, Lai and Yuin rented an apartment at 133 East 4th Street which they used as a "stash" to store heroin and paid for out of a pool of money which Lai, Chang, and Yuin had put together. (Tr. 45-46, 77-82; GX 25-29).

In February or March, 1971 Yuin met Dr. Liu,* an acquaintance from a mah jongg club, at the George Washington Hotel on Lexington Avenue where he handed Dr. Liu two samples of heroin, one each of white and brown. (Tr. 47-52). After receiving a phone call from

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* Dr. Liu, named as an unindicted conspirator, died in February or March, 1975 (Tr. 191-92). He was the owner of the Peking Restaurant in Washington where he was a very well-known member of the Chinese community (Tr. 306-07).

Dr. Liu a few weeks after this meeting in which Dr. Liu ordered all of the white heroin that Yuin had, Yuin took a bus to Washington and brought all the white heroin to Dr. Liu at the Woodner Hotel in Washington. Yuin met Dr. Liu, who instructed him to get into a car. Later, accompanied by his friend Sung Wen Tuck, ("Sung") Yuin picked up approximately $15,000 from Dr. Liu at the Peking Restaurant and returned to New York.*

After Yuin's return he informed Lai of the sale and bought her $10,000 in personal money orders part of which in turn were forwarded to Chang in Hong Kong to finance a second purchase of heroin. (Tr. 58-59, 62-63, 67-68, 323-27; GX 1).**

B. The Second Shipment

Chang received the money in Hong Kong and wrote Lai and Yuin in May 1971 that more heroin would be shipped in coffee tables arriving in July 1971. (Tr. 71-73). Again, a sailor came to the Golden Star Bar where arrangements were made by the sailor, Lai, and Yuin to deliver the coffee tables to the "stash" on 4th Street. (Tr. 73-74). A day or two after the heroin arrived as

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* This sale to Dr. Liu was corroborated by the testimony of Sung who unwittingly accompanied Yuin both to the Woodner Hotel and to the Peking Restaurant (Tr. 284-88). A hotel employee also testified to seeing Dr. Liu at both the hotel and the Peking Restaurant during this period. Registration cards of the hotel were also introduced to show that Dr. Liu stayed there on numerous occasions in the first half of 1971. (Tr. 314-18; GX 31.)

** The brown heroin was sold too, but it took a long time. Lai sold some of it to someone called Lee Louie and paid $4,000 to Yuin as his share (Tr. 67-68.) Yuin sold 25 ounces to somebody but could not recall whom and sold another amount to a person named Sandy. (Tr. 64-65.)

arranged, Lai and Yuin dismantled the coffee tables, which had hollow sides and legs wherein approximately eight pounds of heroin had been secreted in plastic bags each containing five ounces of heroin. (Tr. 75-77, 83).

In August Dr. Liu called Yuin for more heroin and sent Cheung and his bodyguard, one Po Leung, to Yuin to pick it up. Yuin gave eight ounces of heroin to Cheung who was to be responsible for payment. (Tr. 87). Thereafter, Yuin sent his friend Sung to the Peking Restaurant where Dr. Liu paid him $2,500. Sung forwarded this money to Yuin. Another $1,000 was paid to Yuin by Cheung, but Yuin returned $500 to Cheung. (Tr. 89).

3. The Partnership Sales to Lombardi and Purchases from Cho

In the fall of 1971 Lai introduced Yuin to Larry Lombardi * as a customer for their narcotics business. (Tr. 90-91). Yuin then began to visit Lombardi at his home on 95 East Broadway where he delivered on the first occasion a half-pound of the heroin that had come in the coffee tables. Lai accompanied Yuin on the second occasion when they sold Lombardi a kilogram for $18,000. (Tr. 92-93).

After establishing this connection, in September or October of 1971, Yuin met Cho * who asked Yuin if

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* Lombardi, a fugitive at the time of the trial here, was arrested on July 5, 1976. He was tried before Judge Brieant in a three-day trial ending September 15, 1976 when the jury returned a verdict of guilty on all counts. On October 8, 1976 he was sentenced to a term of imprisonment of ten years with a three-year special parole term.

* Cho has never been apprehended.

he were interested in purchasing narcotics from him. Cho at this time had fifteen pounds of heroin. Yuin first purchased five pounds all of which was sold to Lombardi at a price of $15,000 to $16,000 a kilogram. Cho then supplied Yuin with the ten remaining pounds which again was sold to Lombardi; Yuin paid Cho $90,000 for the fifteen pounds after which he had $20,000 to $30,000 profit left in the common pool belonging to Lai, Chang, and Yuin. (Tr. 93-95).

A month later Cho supplied Yuin and Lai with twenty more pounds of heroin at a slightly lower price. (Tr. 96). Almost all of this heroin was sold in increments to Lombardi.* The last sale, one of approximately twenty ounces, took place in early December. (Tr. 97). The total profits to the Lai-Chang-Yuin partnership was $90,000 which they split in roughly equal portions.**

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* Yuin sold a half kilogram of heroin to Special Agent John S. Taylor of the Drug Enforcement Administration on November 17, 1971 (Tr. 97, 457-465, 555-556; GX 48E, 48F, 48G). Prior to that sale, Yuin had sold approximately an ounce and given a sample of heroin to Agent Taylor on November 3 and November 16, 1971, respectively (Tr. 97, 446-47, 542-43, 555; GX 46B, 46D, 47B). These three distributions of heroin were charged, together with a conspiracy count, in Indictment 72 Cr. 1148 (CLB, Jr.). Yuin left for Hong Kong at the end of 1971 and remained there until he was extradited to the United States in November, 1974 (Tr. 107-118). The United States had first requested his extradition in October, 1972; that request was defeated. Upon renewed request and after lengthy court proceedings, Yuin was extradited on November 1, 1974. Shortly after his arrival in the United States, Yuin began to cooperate with agents of the Drug Enforcement Administration and the United States Attorney's Office (Tr. 177, 479)

** The Government introduced into evidence forty-six bank money orders, all in $500 denominations, which Yuin testified he purchased and wrote the payee's name—in each case, a variation of the defendant Lai's name. All but one of these money orders were purchased on December 1, 6, and 12, 1971 from the

[Footnote continued on following page]

4. Relocation to Hong Kong and the Importation of Twenty-Two Pounds of Pure Heroin

A. The Plans

In late November, 1971 Lai left for Hong Kong (Tr. 103). Cheung followed in early December after he had arranged to borrow $3000 from Yuin. Before leaving, Cheung purchased airplane tickets to Hong Kong for Yuin and his wife on his American Express card and was reimbursed in cash by Yuin. (Tr. 103-107; GX 8, GX 54A).*

In late December Yuin left New York for Hong Kong where, a few weeks after his arrival, he met Lai, Cheung,

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Chinatown branch of the National Bank of North America ("NBNA") and were sent to Lai who had left for Hong Kong in late November (Tr. 98-103, 389-99 GX 3, 5, 6, 14, 15, 16, 17, 18, 19). One money order was purchased by Yuin from the Manhattan Savings Bank on December 2, 1971 and sent to Lai in Hong Kong for Chang. (Tr. 346-50; GX 7A) This trip to the Manhattan Savings Bank was corroborated by surveillance conducted by a D.E.A. agent who followed Yuin to the Bank that day (Tr. 360-64) All but six of the NBNA checks were cashed by Lai in Hong Kong between December 22, 1971 and January 12, 1972 (Tr. 420, 431-32). Six of the NBNA checks and the Manhattan Savings Bank check bore the endorsement of Chan Yuet Chun, Chang's wife (Tr. 99, 162, 423; GX 5, 7A).

A handwriting expert testified that the endorsements on 34 of the 46 checks sent to Lai were in fact her signature; of the twelve remaining, six were executed by Cheung and six by Yuin as he testified he had done when they could not be cashed in Hong Kong (Tr. 863-99; GX 71-100).

* A copy of the loan application Yuin made out to get the $3,000, showing Cheung and Cheung's brother as guarantors, was introduced into evidence (Tr. 232; GX 8). A copy of Cheung's American Express statement showing a bill for two airline tickets purchased December 1, 1971 for passage from New York to Hong Kong and costing $1015.30 was introduced into evidence. (Tr. 369, 383-85; GX 54A).

Cho, Loh, and Ka in a restaurant in Hong Kong.* There they discussed cooperating to purchase narcotics to be shipped from Hong Kong to New York (Tr. 108). Cheung, Loh, and Ka were given the assignment of purchasing the heroin on behalf of the group and recruiting a sailor to bring it in; Cheung and Cho were then to arrange for picking up the heroin when it arrived in the United States. Lai and Yuin were given responsibility for selling the heroin once it reached New York. Cheung, and Cho each agreed to purchase "two pieces," or approximately 50 ounces, of heroin apiece. Ka and Loh agreed to buy "one piece" or approximately 25 ounces apiece (Tr. 111). After a later meeting in Cheung's room at the Hotel Singapore** where they agreed to divide the drugs after the heroin arrived in the United States, each participant put up 10,000 Hong Kong dollars per each 25 ounces to be purchased. (Tr. 113-15).

B. The Recruitment of Ting

As part of his effort to recruit a seaman, Ka called his old friend Ting*** to tell him that Cheung had returned to Hong Kong and that the two of them, Ting and Cheung, should get together with each other at a coffee shop near the wharf for the Kowloon ferry (Tr. 600-01). Ka and Cheung thereafter went to the coffee

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* Ka was named as an unindicted co-conspirator.

** Cheung's American Express record showing that he stayed there on January 26, 1972 was introduced into evidence. (Tr. 385; GX 54A).

*** Ting, who testified for the Government trial, was named as an unindicted co-conspirator. He pleaded guilty to a count charging importation of the twenty-two pounds in Florida in 1972. He was sentenced to three years in prison and served just over two years. (Tr. 627).

shop where they proposed to Ting that he bring the heroin into the United States.*

Ting met with Cheung and Ka a second time, joined this time by Cho and his wife. Cheung and Cho told Ting that he should call them wherever he first had a landfall in the United States and told him to strap the heroin to his body when he brought it ashore (Tr. 603). Cheung then gave Ting his home phone number in New York. (Tr. 604-06). Ting told them he would call them from Panama when his ship arrived there. (Tr. 607).

Shortly thereafter Ka telephoned Ting and told him he would deliver the narcotics just before the boat, the M/V Laomedon, was to depart (Tr. 608). The day before the ship left, sometime around the middle of February, Ting received the heroin from Ka, an unidentified woman, and Loh whom Ting only knew by his nickname "Ah Dee." (Tr. 609). The heroin was contained in plastic packages and further contained in a suitcase and paper box which Ting brought to his room and placed under his bed (Tr. 610).

The boat made its way to the Phillipines and Japan before crossing to Panama. Before reaching Panama Ting transferred the heroin from the suitcase and box into his suitcase (Tr. 611; GX 55). When the boat reached Panama, Cheung telephoned Cheung in New York and told him to come with Cho to Miami to take delivery of the heroin (Tr. 612). On April 5, 1972 the Laomedon reached Dodge Island Seaport, Miami, Florida where

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* Ting had met Cheung and Ka before this. In late 1970 or early 1971, Ka, an old friend of Ting's from Hong Kong, introduced Ting to Cheung at a mah jongg club in New York's Chinatown. Cheung took Ting to a coffee shop and a movie house after their meeting, and they discussed narcotics (Tr. 581-83).

Cheung and Cho met Ting and went to a coffee shop to discuss bringing the narcotics off the ship. They decided to bring the heroin off that night. (Tr. 614-15)

C. The Arrests

Ting returned to the ship, got the heroin out of his cabin, and brought it down to the waiting car containing Cho and Cheung. Cheung got out of the car, opened the trunk, and Ting placed the suitcase in the trunk (Tr. 615).

Ting's departure from the ship had been observed by customs agents Frank Torres and Phillip Cascavilla who had been maintaining surveillance of Cho's and Cheung's automobile prior to that time (Tr. 569). After observing Ting on the gangway, Torres and Casavilla drove up to the Chrysler, losing sight of it for a period, and arrived after Ting had returned to the ship. (Tr. 570-71). Torres requested Cho and Cheung to open the trunk. They did so revealing the Ting suitcase which Torres ripped open at the corner revealing the twenty-two pounds of pure heroin. (Tr. 572-74, GX 55, 56, 57).* Cho and Cheung were immediately arrested.

After their arrest Cheung and Cho were warned of their rights by Special Agent Stephen Csukas who had

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* It was stipulated that Torres would identify each of 75 plastic bags contained in two plastic containers which were used to package the heroin after it was taken to the Customs Office. It was further stipulated that the custody of the heroin had been confined to various vaults of the United States Government since the seizure. (Tr. 577-78). It was further stipulated that the heroin had a net weight of 20.71 pounds and that the purity of samples taken from each of the seventy-five bags and mixed together before analysis was 99.9% pure. 0.1% of the contents was undetermined. (Tr. 968-71; GX 60).

arrived shortly after the arrests. Cheung told Csukas that he knew the man on board the ship who had brought the suitcase off and that the man's name was Ting. (Tr. 761-65). After examining the ship's manifest which included more than one Ting, Csukas went out on the deck with Cheung who saw Ting Yee Fong and identified him as the courier. (Tr. 764; GX 59). Ting Yee Fong was taken into custody. (Tr. 766).

D. Cheung's Admissions

In the early morning hours of April 6, 1971 Special Agent William Mason III of the United States Customs Service who interviewed Cheung in the company of a sea cadet from the Laomedon who spoke English and Chinese and served as an interpreter. (Tr. 810). Cheung was again warned of his rights. (Tr. 811).

Cheung then told Mason that during the latter part of 1971 he was asked by a man named "Ying" (whom he owed between $3,000 to $6,000) in New York to go to Hong Kong to recruit a person to bring "something dangerous" back to the United States.* Cheung said he then went to Hong Hong, met Ting, and recruited him. Ting was paid $1,000, according to Cheung. Cheung told Ting that "Ying" would deliver the suitcase to the boat before it left. Cheung also told Mason that he had received a phone call in New York from Ting in the

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* Cheung also made similar statements to another agent who thought he heard the word "Yung" instead of "Ying". "Yung" was described as being approximately 5 feet, 9 inches tall, Chinese and between 50 to 60 years old, a description which fit Yuin (Tr. 850-51). "Yung" was the person to whom Cheung was supposed to deliver the suitcase (Tr. 853). The Government argued in summation that "Ying" and "Yung" were the same person—Yuin. (Tr. 1107).

Canal Zone a few days earlier after which he had flown from New York to Miami with Sammy Cho to meet the Laomedon. (Tr. 818-20).

During the questioning of Cheung, he was permitted to make two phone calls. The numbers he called were the New York residences of Yuin and Lai. (Tr. 461, 852-53, 927).

E. Cheung's Jail Conversations with Ting

On May 13, 1971 while Cheung and Ting were in jail awaiting trial in Florida, Cheung asked Ting to implicate Yuin and not Cheung. Later, he told Ting to implicate Cho and not Yuin. Cheung offered to send $200 a month to Ting's family if he refused to testify about Cheung. (Tr. 627).

The Defense Case

The defendant Cheung presented no evidence aside from certain stipulations offered before the Government rested that Yuin had not previously testified in the grand jury to certain details to which he had testified on direct examination at trial. (Tr. 967-68).

Lai called Dominic Chu, the proprietor of Winner Sportswear, a garment concern in New York, who testified that he employed Lai between April 21, 1972 and September 15, 1972. (Tr. 985-86).

Lai took the stand in her own defense. She testified that she had met Yuin in 1970 through Yuin's wife to whom she had loaned various amounts of money. (Tr. 998-1000). She testified that Yuin had thereafter asked and then insisted that she join him in an unknown business venture. (Tr. 1001-05). Her refusal to enter this

business prompted Yuin to hold a gun, equipped with a silencer, to her head at 133 East 4th Street and threatened to kill her and her husband. (Tr. 1006-07).

Lai testified thereafter, sometime in 1970, that Yuin had forced her to carry a bag of groceries from a theater to a bar where she left the bag. (Tr. 1007-09). On another occasion Yuin asked Lai to buy some unknown medicines from a druggist. (Tr. 1012-14). Later Yuin forced Lai to sign some money orders and attempted to give her a large amount of cash, which he described as "profits from our business.". (Tr. 1010-16).

In 1971, Lai testified, she went to a movie house where Yuin brought a bag of groceries and disappeared with it. (Tr. 1017-19). After this, she was told to sign her name to some checks and was repaid $1,000 that she was owed from her loan to Yuin's wife. (Tr. 1020-22).

Lai testified she left for Hong Kong in November, 1971. After her arrival money orders sent from New York were sent to her. She deposited them in her account in Hong Kong. (Tr. 1022-24). Thereafter, she met Yuin, Cho, Cheung by accident in Hong Kong, and they all had coffee together. (Tr. 1026-27). After this meeting Yuin, who identified himself as the source of the money orders, and Lai went to a bank where she withdrew the money represented by the deposits of the money orders and gave it to Yuin. (Tr. 1030-32).

Lai denied knowing Larry Lombardi and the location of Staten Island and many other particulars of the Government's case. (Tr. 1046-48). Lai denied ever seeing heroin before it was introduced in the Government's case. (Tr. 1020).

Lai was not cross-examined. (Tr. 1048).

ARGUMENT

POINT I

Cheung's prosecution was not barred by a prior prosecution on entirely different charges.

Cheung argues that his prosecution in the present case violated the constitutional prohibition against double jeopardy because of his prior indictment in the United States District Court in the Southern District of Florida. This claim, which was considered and rejected by the District Court,* is meritless.

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* In a memorandum endorsement, the District Court wrote:

"There is no basis to dismiss on grounds of double jeopardy. The Court has examined the Florida indictment 72-262 Cr.-CA (*United States of America* v. *Cho, et al.*). Insofar as movant Ping, there indicated as Kin Ping Cheung, is concerned, he was charged there (Count III) with having, on or about April 5, 1972 in the Southern District of Florida, imported twenty-two (22) pounds of heroin into the United States in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2. Count IV of that indictment charges that at the same time and place, he and Cho possessed the same twenty-two (22) pounds of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).

"The conspiracy charged in the instant indictment, Count One, is alleged to have existed in this District between January 1, 1970 and April 30, 1972. The importation charged here as an overt act took place in New York Harbor, not Florida. The overt acts charged, some twenty-six (26) in number, did not, so far as appear take place in Florida. The substantive count of which defendant was acquitted in Florida does not in any event merge with the crime of conspiracy in this District. *United States* v. *Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); *United States* v. *Ortega-Alvarez*, 506 F.2d 455 (2d Cir.), *cert. denied*, 421 U.S. 910 (1975).

"Count Nineteen could not have been prosecuted in Florida for want of venue. Count Eight differs on its face as to time and place from the Florida charges." (A. *96a-97a*).

[Footnote continued on following page]

A comparison of the Florida indictment (94a-95a) with the indictment upon which Cheung stands convicted in this case (3a-7.7a) reveals the obvious fact that the two indictments charge different violations of the law * and are based upon acts entirely separate from the seizure of the 22 pounds of heroin that was the basis of the Florida indictment. Indeed, it is not even contested by Cheung in either the District Court or in this Court that the distributions in New York City of which Cheung was convicted at the trial of this case were even known to the Government at the time of the Florida indictment or at any time until the informant Yuin began to cooperate with the Government in November 1974. In short, while the importation of twenty-two pounds underlying the Florida indictment may have constituted a part of the considerably wider and larger conspiracy later revealed to the Government, Cheung's claim (Cheung Br. at 13) that he was tried in Florida for the "same acts" as in this case is sheer hyperbole.

This statement of facts was in certain details inaccurate, since Cheung was not "acquitted" in Florida, but rather his conviction was reversed. This was made clear prior to trial. In addition, Judge Brieant ordered overt act 26 of the present indictment—the sole overt act alleged to have occurred in Florida—stricken from the indictment (Tr. 1230).

* As indicated, the Florida indictment charged violations of the law relating to importation and possession with intent to distribute a specific 22 pounds of heroin. The New York indictment charged Cheung with conspiracy to violate the federal narcotics laws (Count One), possession and distribution of eight ounces of heroin (Count Six) and use of a telephone facility to facilitate a narcotics transaction, in violation of Title 21, United States Code, Section 843(b). While Count Two of the Florida indictment and Count Six of this indictment charge violations of the same law—21 U.S.C. § 841(a)(1)—they involved totally different of heroin transactions.

It follows that this prosecution in New York for a conspiracy and specific narcotics transactions that occurred in New York * was entirely proper. Indeed, virtually identical claims to those raised by Cheung have already been rejected by this Court.

In *United States* v. *Ortega-Alvarez*, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), the defendant argued that his conviction in the Southern District of Florida for selling heroin not in the original stamped package in violation of 26 U.S.C. §§ 4704(a) and 7237 barred his subsequent prosecution for conspiracy to violate the federal narcotic laws in the Southern District of New York. The Court said:

> "While it is true that the 1971 conviction arose out of a sale which was part of the present conspiracy, there is no basis for a claim of double jeopardy . . . A charge of a wide-ranging narcotics conspiracy consisting of numerous transactions is certainly sufficiently distinct from a charge of a substantive violation based on a single sale. *United States* v. *Cioffi* . . . [487 F.2d 492] at 497 n.6 498 [(2d Cir. 1973), *cert. denied sub nom. Ciuzio* v. *United States*, 416 U.S. 995 (1974)]."

Similarly, in *United States* v. *Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973), the de-

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* While Overt Act 26 of the present indictment listed Cheung's possession of the 22 pounds in Florida, he was not charged with that substantive crime in this District—where, indeed, no venue lay. It has, in any event, also long been the rule that the overt acts in a conspiracy count "may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself." *United States* v. *Bayer*, 331 U.S. 532 at 542 (1947). Finally, of course, that overt act was stricken from the indictment prior to submission of the indictment to the jury (Tr. 1230).

fendant had previously pleaded guilty in Florida to an information charging conspiracy to violate 26 U.S.C. § 4704(a). He was then indicted in the Eastern District of New York for conspiracy to violate the federal narcotics laws under the statute in effect prior to May 1, 1971. This Court rejected the claim of prior jeopardy, observing:

> "We need not decide whether the two conspiracies charged were identical in fact. It is sufficient to observe that the two convictions were based upon different statutory violations; the second, unlike the first, required a showing of defendant's knowledge of illegal importation. That a defendant may be punished for multiple violations of the narcotics laws arising from a single transaction is well settled, see *Gore* v. *United States*, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed. 2d 1405 (1957); and we are not aware of any constitutional requirement that all such violations must be tried together. See, *e.g.*, *United States* v. *Jones*, 334 F.2d 809, 811 (7th Cir. 1964), *cert. denied*, 379 U.S. 993, 85 S.Ct. 707, 13 L.Ed. 2d 613 (1966)." (footnotes omitted.)*

In short, since the crimes charged in the Florida indictment and those charged in the New York indictment

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* The last sentence of the quoted portion of the opinion disposes of Cheung's statements that the present prosecution was intended to "correct an oversight" in the Florida prosecution and to "seek an advantage." (Cheung Br. at 14). See also *United States* v. *Mallah*, 503 F.2d 971, 989 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975) (". . . the multiplicity of indictments is more attributable to the multiplicity of appellant's criminal acts than to the bad faith of the government.") In this case the Government's good faith is particularly clear since the present indictment was based largely upon the testimony of an informant who did not begin to cooperate with the Government until 1974.

were obviously not "in law and fact the same," *United States* v. *Cala*, 521 F.2d 605, 607 (2d Cir. 1975); *United States* v. *McCall*, 489 F.2d 359, 362 (2d Cir. 1973), *cert. denied*, 419 U.S. 849 (1974); *United States* v. *Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973), his claim is frivolous.

POINT II

The trial court did not err in declining to hold a second suppression hearing on the legality of Cheung's statements.

Prior to Cheung's trial in 1972 in the Southern District of Florida on different charges, a suppression hearing was held in that district in which the District Court, after fully reviewing the evidence, denied Cheung's motion to suppress certain post-arrest statements made by him.* The statements were then introduced into evidence against Cheung without objection; while Cheung appealed his conviction, no appeal from the denial of his suppression motion appears to have been taken.** Prior to Cheung's trial in this case, he again moved for a suppression hearing on the legality of the same statements. This request was properly denied by the District Court after a review of the transcript of the Florida suppression

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* As the District Court in this case noted (App. 97a) a copy of the opinion apparently written by the Florida court denying the motion has been unavailable.

** The statements were first introduced in a trial that ended in a mistrial. They were then introduced a second time in a trial that led to Cheung's conviction. This conviction was appealed to the United States Court of Appeals for the Fifth Circuit which reversed the conviction on grounds that the mistrial, declared *sua sponte* by the trial court in the first trial was an abuse of discretion not justified by the doctrine of "manifest necessity", *United States* v. *Kin Ping Cheung*, 485 F.2d 690, 691 (5th Cir. 1973).

hearing.* Cheung's claim on appeal that the motion should have been granted is meritless.

First, Judge Brieant's conclusion that "defendant should be collaterally estopped to relitigate the issue here" is well supported by precedent, and, particularly in the context of the facts of this case, was eminently correct. This Court has recently reviewed the applicability of the civil concept of res judicata and collateral estoppel to criminal proceedings in *United States ex rel. DiGiangiemo* v. *Regan*, 528 F.2d 1262, 1265 (2d Cir. 1976). In that decision, Judge Friendly, writing for the Court, noted:

> "For purposes of issue preclusion, 'final judgment' includes any prior adjudication of an issue in another action between the parties that is determined to be sufficiently firm to be accorded conclusive," ALI, Restatement of Judgments 2d, Tent. Draft No. 1 § 41 (1973); *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80, 87-90 (2d Cir. 1961), *cert. denied*, 377 U.S. 934 (1964). Factors supporting a conclusion that a decision is final for this purpose are "that the parties were fully heard, that the court supported its decision with a reasoned opinion, [and] that the decision was subject to appeal or was in fact reviewed on appeal. Restatement, supra, § 41 et 7."

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* The relevant portion of Judge Brieant's endorsement denying Cheung's motion is as follows:

> This Court has reviewed the transcript of that hearing. On that transcript, a finding that the admission was voluntary and admissible could not be regarded as clearly erroneous. Defendant should be collaterally estopped to relitigate the issue here. The Court declines to hold a further suppression hearing on a claim regarded as not even colorable. (App. 97a).

Each of the factors discussed in the *DiGiangiemo* are of course met here, since the suppression hearing in Florida involved the same parties, precisely the same issues, and the same interest of each party—in short, the facts Cheung now wishes to explore were fully aired and litigated and found against him. It follows that, particularly in the absence of any showing or claim by Cheung that the Florida proceedings were inadequate or incomplete, Cheung may not litigate the matter again.

Second, Cheung misunderstands the nature of the inquiry required by a hearing to test the legality of a post-arrest statement. The Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) noted that the prosecutor faces a "heavy burden" of demonstrating that a post-arrest statement is voluntary within the meaning of that opinion. Thus, before a statement may be admitted into evidence the Government has the initial burden of showing by a preponderance of the evidence, *Lego* v. *Twomey*, 404 U.S. 477 (1972), that the statements were legally procured. What Cheung fails to acknowledge is that the Government made the requisite showing to the satisfaction of the District Court, which expressly stated that he had carefully read the transcript of the Florida proceeding and found therein more than a sufficient basis to conclude that the Government had met its burden of demonstrating that the statements were voluntary.* A further hearing might have been proper had Cheung claimed that the Florida court's decision was based on an erroneous view of the facts or the law, or if Cheung had alleged new facts concerning the facts of the statement, no such claim or showing was even attempted. Cheung essentially claimed that the Government's initial

*Indeed, Judge Brieant found that Cheung's claim was not even "colorable."

burden in demonstrating the voluntariness of the statements entitles him to a separate hearing every time the statement is used even without *any* new facts being alleged or claimed by him—a claim that finds no support in the law or in common sense. Since Cheung never alleged "sufficient facts which, if proven, would have required the granting of the relief requested by appellant," he had no right to a hearing. *United States* v. *Culotta*, 413 F.2d 1343, 1345 (2d Cir.), *cert. denied*, 396 U.S. 1019 (1969); see also *Grant* v. *United States*, 282 F.2d 165, 170 (2d Cir. 1960); Wright, Federal Practice and Procedure § 675 (1969). It follows that the district court's ruling was entirely correct.

POINT III

There was no undue delay in the indictment of Cheung nor was he prejudiced thereby.

Cheung claims that an eight-month pre-indictment delay should have precluded his trial in this case. This claim is without merit.*

As defined by the Supreme Court in *United States* v. *Marion*, 404 U.S. 307 (1971) there are two prerequisites

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* This claim was considered and rejected by the trial court in an Endorsement by Judge Brieant dated May 13, 1976, which reads in relevant part as follows:

> "To the extent the within motion seeks to dismiss for undue pre-indictment delay, it is denied. There is no showing of intentional delay to prejudice movants' rights or contrived procrastination to seek tactical advantage. Indeed, pre-indictment delay usually redounds to a defendant's advantage, since witnesses forget, become more vulnerable to cross-examination, and it is the prosecutor who must discharge the burden of proof. See *United States* v. *Eucker*, 532 F.2d 249 (2d Cir. March 8, 1976)." (App. 96a).

to a finding that the due process rights of the defendant have been offended by pre-indictment delay. The court said that such a finding could be justified:

> "If it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to [the defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantages over the accused."

Id. at 324. Cheung has not even mentioned one of these prerequisites (intentional delay) and has not supported the other.

While the indictment in this case was filed three to five years after the facts in the case occurred, the filing occurred only eight months after the informant whose testimony formed the basis of the case began to cooperate with the Government. This period of eight months can be considered neither as "delay" nor as "intentional" within the meaning of *Marion.** During the period between November when the informant began to cooperate and the defendant's indictment in June the matter was being investigated and the case was being presented to the Grand Jury. The investigation revealed a conspiracy involving Cheung and at least 13 other named co-conspirators. This court has continually recognized the need and preference for careful, accurate investigation--even at the price of delay. *United States* v. *Finkelstein*, 526

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* We do not read Cheung's brief to claim that he should have been indicted prior to the informant's initial cooperation (Br. at 20). At any rate, this Court has held that the Government is obviously not responsible for a period during which a key witness is unavailable to it. *United States* v. *Rubinson*, — F.2d —, Dkt. No. 75-1195, slip op. 3119 (2d Cir. April 8, 1976); *United States* v. *Ferrara*, 458 F.2d 868 (2d Cir.), *cert. denied*, 408 U.S. 9331 (1972).

F.2d 517 (2d Cir. 1975); *United States* v. *DeMasi*, 445 F.2d 251 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971); *United States* v. *Parrott*, 425 F.2d 972 (2d Cir.), *cert. denied*, 404 U.S. 824 (1970).

There is thus absolutely no evidence that there was deliberate or undue delay traceable to the Government.

Furthermore, Cheung has failed to show any actual prejudice to his right to fair trial. Both the Supreme Court in *Marion*, *supra*, 404 U.S. at 322-23, and this Court, see *United States* v. *Brasco*, 516 F.2d 816, 818 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975); *United States* v. *Foddrell*, 523 F.2d 86, 87-88 (2d Cir.), *cert. denied*, 423 U.S. 950 (1975), have emphasized that a showing of actual prejudice to the right to a fair trial, rather than presumed or imagined prejudice, is necessary to sustain the defense.* Cheung has failed to do this. His claim that two witnesses were lost is frivolous in view of the fact that Sammy Cho—who in any event was a co-defendant, and thus highly unlikely to exculpate Cheung—became a fugitive in December 1973, long before the investigation began, and Dr. Liu died in February 1975, prior to the indictment in this case and long before "any realistic trial date," *United States* v. *Stein*, 456 F.2d 844,

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* Indeed, it would be difficult to infer prejudice from the slight delay in this case, which was far shorter than in many other cases where the issue was decided against the defendant. See, *e.g.*, *United States* v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972) (approximately four year delay); *United States* v. *Ianelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972) (four year 11 month delay); *United States* v. *Schwartz*, 464 F.2d 499, 503-04 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972) (four and a half year delay); *United States* v. *Mallah*, 503 F.2d 971, 989 (2d Cir. 1974) (13 month and 18 month delays); *United States* v. *Brown*, 511 F.2d 920 (2d Cir. 1975), (17 month delay).

848 (2d Cir. 1972). Furthermore, Cheung has not made any showing—as he must—of the content of the witnesses' expected testimony or how it would help him.

POINT IV

Cheung's claims with respect to the court's instructions to the jury are without merit.

Cheung argues that the court's charge to the jury was improper for a number of reasons. These claims are baseless and should be rejected because with one exception, no objection was made at trial; and, in any event the instructions were proper.

This court has consistently required a defendant to voice objections at trial to the court's charge to the jury if he wishes to make such objections on appeal. *United States* v. *Erb*, Dkt. No. 76-1143, slip op. 49, 60, 65 (2d Cir., October 1, 1976); *United States* v. *Araujo*, 539 F.2d 287, 291 (2d Cir. 1976); *United States* v. *Scandifia*, 390 F.2d 244, 248 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969). *Cf. United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). This is consistent with—and indeed required by—the explicit command of Rule 30, Federal Rules of Criminal Procedure, that "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Nor has this Court found plain error absent facts far more extreme than those in the instant case. *United States* v. *Scandifia*, *supra*, 390 F.2d at 248-49 (2d Cir.). See Rule 52(b), F. R. Crim. P. There has been no "plain error" in this case.

During his summation, Cheung's lawyer spent a considerable portion of his time assailing not the quality or the quantity of the evidence against his client, but rather the Government's treatment of cooperating defendants. The Court in its instructions noted that such practices were "permissible," but that they may cause the witnesses to hold a bias in favor of the Government. Thus, the charge fully complied with this Court's standard announced in *United States* v. *Swiderski*, — F.2d —, Dkt. No. 75-1422, slip op. 4147, 4157 (2d Cir. June 11, 1976), for instructions regarding accomplice witnesses.*

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* Cheung's brief includes excerpts from the court's instruction on accomplice testimony but omits that portion of the charge instructing on the care such testimony should be given. Below is the complete excerpts with the omitted paragraph in brackets:

"Now, a word about the witness Yuin Kwei Sang, also referred to as George Yuin and Ting Yee Fong, who were called by the government as witnesses at the trial. By their own testimony, Yuin and Ting Yee Fong were accomplices in the crimes charged against the defendants on trial and in the prosecution of crime, the government is frequently called upon to use accomplices as witnesses. Often it has no choice because the government must rely on such witnesses as to transactions as there may be and it's not frequent that people of impeccable reputation are witness to and participants in criminal endeavors. The government frequently must use such testimony otherwise it would be difficult or impossible to detect or prosecute wrong-doers. There is no requirement in the federal court that the testimony of accomplices be corroborated. The conviction may rest upon the uncorroborated testimony of an accomplice if you believe it and find it credible.

[The fact a witness may be an accomplice should be considered by you as bearing upon his or her credibility. However, it doesn't follow that because a person has acknowledged participation in a crime as charged against the defendants or other crimes, he is not capable of giving a truthful version of what is testified to. Their testimony, however, should be viewed with great caution, scrutinized carefully. Was the testimony of either of them inspired by any motive of reward of self-interest or

[Footnote continued on following page]

The missing witness charge, which instructed the jury to make no inference from the failure to call a cumulative witness, has been specifically approved in a recent decision involving a very similar charge given by the same judge who tried this case. See *United States* v. *Erb*, — F.2d —, Dkt. No. 76-1143, slip op. 49, 59 (2d Cir., October 1, 1976).*

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hostility to the defendants so that any such witness gave false or slanted testimony against them? If you find it was, you ought to unhesitatingly reject [*sic*]. However, if after cautious and careful examination of a witness' testimony and considering his demeanor or behavior on the witness stand, the way he answers the questions and the nature of the testimony given you are satisfied that that witness told the truth as to certain events, there is no reason why you should not accept it as truthful and credible and act on it accordingly.]

Now, it's also permissible for the government to arrange for special benefits for accomplices who become cooperating individuals and this can include provisions for their financial support, that of their families, in obtaining new employment for them in a different place, attempting to prevent their deportation to Hong Kong or arranging to bring the wife to the United States from Hong Kong. All of these procedures are permissible. However, there is the possibility that such benefits conferred upon a self-admitted criminal might create a bias on his part in favor of the government or might be an inducement to testify falsely, so these matters are proper matters for your consideration in weighing the testimony of Ting Yee Fong and George Yuin, along with all of the other relevant evidence in the case." (Tr. 1198-99-1200).

* In *United States* v. *Erb*, *supra*, slip op. at 59 the Court noted:

> ". . . the weight of authority in this circuit and '[t]he more logical view is that the failure to produce [a witness equally available to both sides] is open to an inference against both parties.' Yet, there is substantial precedent for the charge Judge Brieant gave that the jury may not draw an inference if the witness is equally available. *United States* v. *Miranda*, 526 F.2d

[Footnote continued on following page]

The sole portion of the charge to which Cheung now objects *and* to which he also objected in the District Court Is Judge Brieant's quite proper admonition that the jurors were not to consider the public policy implications of whether or not the Government had properly treated its witnesses. This was in response to the wholly improper assertion by defense counsel in summation that a guilty verdict would constitute an implicit stamp of approval on the Government's policies. (Tr. 1168). As this Court has noted, it is entirely proper to admonish jurors not to consider the public policy consideration extraneous to their verdict, such as the sentences that defendants might receive. See *United States* v. *Araujo*, — F.2d —, Dkt. No. 676-1085, slip op. 5101, 5106 (2d Cir. July 26, 1976). Particularly since the Court had explicitly told the jury that they could and should consider any largesse received by the witnesses as a possible influence on those witnesses' veracity (Tr. 1198-1200), the challenged portion of the charge—and, indeed, the charge in its entirety, in which it must be viewed, *United States* v. *Gent le*, 530 F.2d 461, 469 (2d Cir.), *cert. denied*, — U.S. —, 44 U.S.L.W. 3545 (March 29, 1976)—was entirely proper.

1349, 1331 (2d Cir. 1975); *United States* v. *Dangiolillo*, 340, F.2d 453, 457 (2d Cir. 1965); *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631, 638-39 (2d Cir. *cert. denied*, 329 U.S. 742 (1946). It would of course, be easier for district court judges to follow one clear signal from this court. But the differing views in the decisions cited above do not on further examination seem as startling as at first glance. We have been unable to find any opinion in this circuit that reversed a conviction because the judge instructed the jury to draw no inference from the absence of an equally available witness. We believe that this reflects a well deserved reluctance to remove the issue from the sound discretion of the trial judge."

POINT V

Testimony concerning threats to the family of a witness did not prejudice Cheung.

Cheung complains that he was prejudiced by testimony on cross and redirect examination of the witness Yuin concerning threats to his wife. This claim is refuted by the context of the testimony (which Cheung does not make clear) and by the careful limiting instructions given by the District Court (which Cheung ignores altogether).

During cross-examination of Yuin, defense counsel, in an effort to impeach him, attempted at length to elicit from Yuin the largesse and favors he had received from the Government. In particular, defense counsel brought out that Yuin had been told that the Government would intercede in his behalf so that he might not be deported to Hong Kong, and also that his wife would be brought to the United States. (Tr. 240-43). When Yuin attempted to explain that he could not go back to Hong Kong because it was dangerous for him there, defense counsel elicited the truthful but incomplete statement that he, personally, had not been threatened. (Tr. 243).

In the face of this impeachment, which made Yuin appear to be both inconsistent and parasitic, the District Court properly allowed the Government to elicit on redirect examination that Yuin's wife had been threatened in Hong Kong, thereby making it clear that he could not safely return to nor could she safely remain in that country. In addition, the Court carefully instructed the jury that the testimony could be considered only as proof of the witness's statement of mind; that it could not be considered as proof of the fact that there

were threats; and that since the threats took place in Hong Kong at a time when the defendants on trial had been in the United States, there was no absolutely no connection between the threats and those defendants.*

In the context of the case, and when viewed with the careful limiting instruction, the testimony was entirely proper. This Court has ruled on several occasions that testimony concerning intimidation and threats, even if hearsay, are admissible to prove a witness's statement of mind. *United States* v. *Tramunti*, 513 F.2d 1087, 1120 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Malizia*, 503 F.2d 581; *United States* v. *Cirillo*, 468 F.2d 1233 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States* v. *Berger*, 433 F.2d 680 (2d Cir. 1970), *cert. denied*, 401 U.S. 962, (1971). Particularly since the very brief testimony could not possibly have inculpated the defendants, Judge Brieant

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* "THE COURT: I will give a special instruction on this. There is absolutely no evidence, and no charge here, that anybody who is on trial before you had any connection with any threats. I will rule, however, that since this question of his wife coming to the U.S. was gone into on cross examination it may be brought out. However, the jury is to understand that these defendants have been here in the U.S., and not in Hong Kong, and there is no suggestion whatever, and none is intended by any of these questions, that they had anything to do with any threats.

MR. ROSENTHAL: I object to any hearsay on the part of this witness in respect to his wife, if the court pleases.

THE COURT: The jury will understand that he is being asked what his wife told him, and it's not taken for proof of the fact that she was actually threatened but it may be taken for proof of this witness' state of mind as affecting any of his dealings with the government, or anything that the government may have done for his family." (Tr. 274-75).

did not abuse his discretion in receiving the testimony * to set the record straight after cross-examination had been used to give a "distorted impression of [the] witness's credibility." *United States* v. *Panebianco*, Dkt. No. 76-1132, slip op. 119, 130 (2d Cir. Oct. 14, 1976).

POINT VI

The use of an interpreter by a Government witness was not objected to by Lai, nor did it prejudice her.

Lai contends that the use of an interpreter by a Government witness deprived her of her constitutional rights. This argument is silly. Not only did Lai waive any right she might have by not having objected at trial, but the record discloses no abuse of discretion by the trial judge in allowing the interpreter.

This Court has consistently required that objections be raised at trial if the objector wishes to press the objection on appeal. *United States* v. *Friedland*, 391 F.2d 378, 381 (2d Cir. 1968), *cert. denied*, 404 U.S. 867 (1971); *United States* v. *Indiviglio*, *supra*. Lai had ample opportunity to object to the use of the interpreter and did not even attempt to do so, as she admits in her brief. (Lai Br. at 32). If Lai had desired to contest the witness' need for an interpreter it would have been a simple matter to raise an objection thereby allowing the court to hold a hearing on the matter, if necessary, and to determine, on the record, the extent of the witness'

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* *United States* v. *Burse*, 531 F.2d 1251 (2d Cir. 1976), the only case cited by Cheung, involved factual misstatements made by a prosecutor, and is thus utterly inapplicable.

fluency in English and the advisability of using an interpreter. Indeed, the witness Yuin was questioned closely on his knowledge of English (Tr. 245, 269, 281-83), yet no objection to the use of an interpreter was made. Particularly since an objection at trial would have occasioned an inquiry into the true facts of the witness' English fluency, Lai's claim that a new trial should be granted on the basis of the near-barren record is frivolous.

Furthermore, the record contains nothing indicating that plain error—or even error at all—was committed.* Indeed, Lai does not contest the fact that Chinese was Yuin's mother tongue and principal language. In the absence of *any* showing that Yuin was entirely fluent in English, the need to insure a proper understanding of the witness by the jurors made the advisability of using an interpreter obvious.**

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* The judge carefully instructed the jury about the use of interpreters, noting specifically that if the jury found that a witness had feigned ignorance of English, the jury might consider that in the same manner as if the witness had given a false statement in his testimony. (Tr. 1196-98).

** Indeed, in a case involving the use of an interpreter in a situation potentially far more prejudicial to the defendant, the court found no abuse of discretion. In *United States* v. *Frank*, 494 F.2d 145, 157-58 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974), the witness made use of her interpreter only during cross-examination and then only when the questioning became rough. This Court found the procedure permissible, even though a proper objection was made and no hearing was held.

POINT VII

Returning a witness' diary to him during trial was not improper.

Lai claims that allowing the witness Yuin to control his own diary of events long post-dating the conspiracy should have caused a mistrial. This argument can only be reviewed in the context of a more complete statement of the facts than that which Lai provides the Court.

During the luncheon recess of the third day of trial —with Yuin still on cross-examination—the Government inquired of him whether he kept a diary, he said that he did and produced two books to show to the Assistant United States Attorney trying the case. The Government took the position then that the diary, which covered a period roughly from January 1, 1975, up to the date of the trial, was not 3500 material because it was not in the Government's possession, but that it might contain other material, perhaps with *Brady* implications, which the defense had a right to know and inquire about (Tr. 255-56). The Court ruled that the diary, which, except for a few notes and proper names, was in Chinese characters and very lengthy, was not 3500 material but that it "might possibly be *Brady* material" (Tr. 258-59). The Court then had the diary marked for identification and made available to defense counsel (Tr. 259; GX 3545, 3546). The Court then said that the witness Yuin should be available for cross-examination on the diary after the interpreter for the defendant Lai had a chance to review it. The Court further stated that it was his wish that the diary not leave the Courthouse (Tr. 273).

On redirect examination Yuin interrupted an answer he was giving to complain about his diary being read by the defense, and the diary was returned to the Assistant United States Attorney (Tr. 274).

Later that same day, Yuin having left the stand, counsel for Lai stated that only the first page of the diaries had been translated and represented he wanted to inquire further of Yuin as a result of that translation (Tr. 296). The Government then made application to have the diary returned so that it might be reviewed by the Assistant United States Attorney for any matters touching upon the *Brady* principle after which the Government could submit the matters which were *Brady* matters to the defendants and those matters which were questionable to the Court for *in camera* inspection and ruling (Tr. 297-98).

The Court, observing that Yuin might have, on the one hand, Fifth Amendment rights with respect to the diary, and, on the other hand, legitimate fears for the safety of himself and others if all the material were in the hands of his enemies, agreed with the Government's position (Tr. 299). The Court then directed the Government to have the diaries translated as quickly as possible and ruled that the witness was "entitled to the security and privacy of his diary" urging the Government, in the meantime, to discover whether the material in the diary might be turned over to the defendants without any harm coming to anybody (Tr. 301-02).

That evening the Government met with the witness and the Government interpreter Mrs. Laura Ho, both of whom agreed that the translation of the diary would consume a couple of weeks. (Tr. 375). The Assistant United States Attorney then directed the witness to cull out of the diaries those matters that concerned his relations with the Government, give those to the interpreter, who would review these portions with him before translating them for the Assistant United States Attorney (Tr. 378-79).

The Court the following day suggested that the procedure be reversed whereby Yuin would cull out the por-

tions he did not regard as privileged, turn those over to the defense, and give the privileged portions to the Government for its review. (Tr. 380).

Counsel for Lai, for his part, repeated his desire to recall Yuin based on the translation of the first page, and disputed the Government's two-week estimate, pointing out that some of the material was in English (Tr. 376-77). The judge ruled, however, that any questions about Yuin's English ability would be cumulative.

The diary, then in Yuin's hands, contained weather reports and records of correspondence with his daughter in Shanghai, as well as records of his meetings with his own lawyer, matters which were undoubtedly privileged (Tr. 377). Also contained in the diaries were detailed—and as the Court observed, "self-serving"—records of his meetings with the Assistant United States Attorney and the Drug Enforcement Administration agent working on the case (Tr. 377).

Lai's counsel, upon hearing that the witness had his own diaries in his control, moved for a mistrial. The motion was denied (Tr. 381-82). Shortly thereafter, Lai's counsel questioned Special Agent John S. Taylor of the Drug Enforcement Administration extensively on cross-examination about his knowledge of the contents of the diary (Tr. 472-75, 477-78, 493-97).

On Friday, June 11th, the Assistant United States Attorney reported that he had to meet with Yuin's lawyer with respect to any privilege that Yuin might wish to assert as to the contents of the diary (Tr. 591-92). Lai's counsel again objected that Yuin still had his own diary and claimed that Yuin might be tampering with it. The Court observed that there was no evidence of tampering. (Tr. 593-95).

On Monday, June 14th, the Government produced for the defense those portions of the diaries which dealt with Yuin's relationship to the Government (Tr. 689; GX 3545A, 3546A). Only one copy was supplied because the characters were so miniature that they could not be reproduced or photocopied (Tr. 690).

On the following day, the Assistant United States Attorney reported to the Court that he had prevailed upon the witness Yuin to turn over the rest of the diaries to the defense. The rest of the diaries were turned over with the proviso that these portions be read by the interpreter only. The interpreter, however, might then translate and discuss the contents with the defendants and their lawyers. There was no objection to this procedure. (Tr. 787-89; GX 3545B, 3546B).

At the close of the day, Lai's counsel stated he would request a mistrial on the grounds that there were pages purportedly in English and dealing with the Witness Protection Program which were allegedly missing from the diaries. (Tr. 941). The Court stated that it would allow Yuin to be examined outside the presence of the jury as to whether he had removed any pages from his diary, and that if Yuin said that he had, he should be examined as to that with the jury present. (Tr. 942-46).

The following morning the Assistant United States Attorney reported that Yuin had told him that no pages had been removed from the diaries. (Tr. 957). Lai's counsel then stated his intention to introduce only those three or four pages of the diary with handwriting in English not for the truth of the contents but rather as specimens of Yuin's English handwriting. (Tr. 958-59). The Government countered by stating its intention of offering the original letter from United States State Department dealing with his wife's immigration problems that

Yuin copied into his diary in English. (Tr. 962-65). The pages from the diary and the State Department letter from which they were copied were then introduced into evidence by stipulation. (Tr. 992-93; DXH; GX 101). Yuin was never recalled by the defense, although he was available for that purpose.

Viewed against these facts, Lai's contention is utterly without merit. First, it is clear that the prosecution acted entirely reasonably in response to the difficult and unforeseen situation that arose during trial. The diary itself—which did not concern the content of Yuin's testimony against the defendants, since it covered a period of time years after the transactions involved, but only his meetings with Government personnel as well as more personal and clearly irrelevant material—was made available to defense counsel during the trial as soon as the existence of the diary was known. Only after it became evident that translation of the lengthy document into English could not be accomplished during the trial was the diary turned over to Yuin for him to determine which passages concerned his meeting with the prosecution. This procedure was, under the circumstances, clearly reasonable; indeed, no reasonable alternative was suggested by defense counsel. Thus, Lai's contention that "this case does not fall within those cases where the Government's actions were merely inadvertent or negligent," * (Br. at 38) is belied by the facts.**

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* Lai also claims that "the Government did not even take the simple precaution of xeroxing the contents of this diary" before allowing Yuin to examine it. As was made clear on the record (Tr. 690), the entries in the diary were so small that xerographic reproduction was impossible.

** Furthermore, Lai's contention that a more stringent test must be met if the suppression is deliberate is inconsistent with the holding of the Supreme Court in *United States* v. *Agurs*,

[Footnote continued on following page]

Second, Lai's assertions of misuse of the diary by Yuin are based entirely upon speculation, and are improbable at best. The diary, of course, had been in Yuin's possession at all times prior to and even during the trial—indeed, Lai complains solely of what was in actuality nothing more than a return to the *status quo ante.* To claim that he would have altered the diary during the very brief period when the diary was returned to him is not plausible given his opportunity to do so before trial. Furthermore, it should be noted that even after the existence of the diary became known, absolutely *no* use of its contents was made at trial for impeachment purposes nor has defense counsel even pointed to a single portion of the diary that even bears on Yuin's testimony or that could conceivably have been altered.*

Finally, even if one were to exercise one's imagination, as Lai wishes this Court to do, it is clear that *at most* the diary might have contained something of possible impeachment value of Yuin, although it is hard to imagine a fact of Yuin's relationship with the prosecution helpful to the defense that would not already have been made available to the defense pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1969).** Particularly since the defense was already armed with considerable amount of

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— U.S. —, 44 U.S.L.W. 5013 (June 24, 1976), that "the constitutional obligation is [not] measured by the moral culpability, or the wilfulness of the prosecutor," but rather by the relevance of the material itself. This holding would appear to limit or overrule many of the decisions upon which Lai relies in this regard.

* In addition, of course, Lai does not explain in any but the most vague terms how the diary could have been altered without any risk of detection.

** Prior to trial, the Government provided the defense information concerning an arrest of Yuin in Hong Kong, specifically noting that the material was being furnished pursuant to *Brady.* (Affidavit of Thomas E. Engel sworn to April 19, 1976 ¶ 15).

impeachment material concerning Yuin, the effect of any further material, assuming the judge would have allowed the inquiry, would have been minimal. *Cf. United States* v. *Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975).*

In sum, particularly in the absence of *any* demonstration that the diary contained anything or could be of any use to the defense; or *any* attempt to show a portion of the diary that had conceivably been altered; or any attempt to question Yuin concerning the diary, the claim should be rejected for what it is—an attempt to create reversible error out of pure speculation.

CONCLUSION

The judgments of conviction should be affirmed.

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

RICHARD F. LAWLER,
THOMAS E. ENGEL,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

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* Furthermore, Lai's claim that the conviction was based "entirely" upon Yuin's testimony is belied by the introduction into evidence, *inter alia*, of money orders endorsed by her of more than $20,000 that had been sent to her in payment of heroin shipments. (Tr. 98-103). See *United States* v. *Rosner*, 516 F.2d 269, 275 (2d Cir. 1975).

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THOMAS E. ENGEL, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of October, 1976 he served a copy of the within Brief (two copies) by placing the same in a properly postpaid franked envelope addressed:

Gilbert S. Rosenthal, Esq.
401 Broadway
New York, N.Y. 10013

Julia P. Heit
142 East 16th Street
New York, N.Y. 10003

An deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borought of Manhattan, City of New York.

Thomas E. Engel

THOMAS E. ENGEL

Sworn to before me this

27 TH day of October, 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1341975
Qualified in Kings County
Commission Expires March 30, 1977